lit

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STANLEY H. BARER and REID A. MORGAN, Appellants, v. THE CITY OF SEATTLE and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	)	SHB NO. 91-58 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for hearing before the Washington State Shorelines Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Harold S. Zimmerman, Annette S. McGee, Dave Wolfenbarger and O'Dean Williamson.

The matter is the request for review of a variance denied by the City of Seattle to Stanley H. Barer concerning residential development.

Appearances were as follows:

1. Stanley H. Barer and Reid A. Morgan by Mark A. Rowley, Attorney at Law.

2. The City of Seattle by Sandra M. Watson, Assistant City Attorney.

The State, Department of Ecology, did not appear.

The hearing was conducted at Seattle, Washington on April 14, 1992.

Gene Barker and Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. The Board viewed the site of the proposal in the company of Judge Harrison and the parties. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This case arises on the shores of Lake Washington, in the Laurelhurst neighborhood of the City of Seattle.

II

The lots of the Laurelhurst neighborhood are fully developed with residences along the Lake Washington shore. The site in question is one such lot. In early days it was the dumping ground for boiler ashes from the University of Washington. Later, in 1909, a home was constructed on the lot. That original home had some 1,581 square feet of living space. There was also a small two car garage. The home lacked a basement.

III

The lot in question lies upon a point of land, and is pie shaped with its waterward boundary being wider than its upland boundary. The lot is about 16 feet below street level and was connected to the street by a steep driveway. Homes were also built to either side (north and south) of the original home on this lot.

IV

Later, in 1977, the City adopted its shoreline master program providing, in pertinent part:

> *Residences on waterfront lots shall not be located further waterward than adjacent residences. If there are no other residences within one hundred feet (100'), residences shall be located at least twenty five (25') back from the line of ordinary high water.*

In this case, the neighboring residences are within 100 feet. Consequently the residential set back line is determined by a line connecting the adjacent residences on each side of the subject property. That, in turn, meant that the set back line lay entirely landward of the 1909 home. Thus, any further development of the residence would only be possible by seeking a variance.

IV

In 1982, the then owner of the home, Mr. Robert Steil, sought a variance to expand the 1909 home from 1,581 square feet to 4,067 square feet of living space. A two car carport was also proposed. Mr. Steil, however, preferred personally to do without a basement, and did not propose one.

V

The City concluded, in 1982, that:

> *Without this variance, then, the owner would be denied development of a home with square footage which is commensurate with the neighborhood.*

The City approved the 1982 variance, expanding the home to its present size. This resulted in the home being set back 68 feet from the water, an interval which is both gracious and uncrowded.

VI

In 1985 the appellant, Mr. Stanley H. Barer, purchased the home in question. Mr. Barer has a personal preference, shared by his family, for a basement. In his view a basement would provide needed storage area lacking in the formal area of the home. In addition to storage, the basement would provide a separate but connected area for the Barer's teen-age son to enjoy and record music, to entertain friends, and provide space for a family exercise area including weight training and therapy.

VII

Both Mr. Barer and his architect considered conversion of existing rooms to serve the purposes of a basement. This approach was, however, impractical both from the standpoint of aesthetics and function. As an example, weight training or teenage music recording were incompatible with both the sleeping and entertainment areas of the home. An area over the garage was also inappropriate as underscored by complaints from the neighbors when teenage music was played there.

VIII

It is impractical to develop a basement on the street side of the house due to soil conditions and the residue of boiler ash where digging would occur. This was discovered by the development of a small wine cellar in that area which had to be quite limited in size due to these conditions.

IX

Indeed, the soils under the Barer home generally are such that reinforcing rods were pounded vertically under the entire home to prevent shifting. Since these would need to be removed to put a basement under the home, the architect first suggested a plan by which the basement essentially was not under the home at all but jutted out 30 feet perpendicular to the waterward face of the home. A variance sought for this proposal was denied by the City.

X

At the pre-trial conference in this matter, some six months before trial, Mr. Barer and his architect proposed a revised basement plan to the City. The revised proposal would tuck the basement underneath an existing terrace on the waterward face of the home. That, alone, would not change the set back from its current condition. In order to access the basement, however, an indoor stairway is proposed. To avoid breaking up the living room or blocking

views from the dining room, a small addition to the family room was proposed as space to contain a spiral stairway to the basement. The family room addition would fill in a notched corner of the present home formed by the protrusion of the terrace beyond the family room. In effect, the family room would advance 10 feet closer to the water bringing it on line with the terrace. The resulting set back would remain at 68 feet, although the corner of the house would advance by 10 feet. The revised proposal was placed at issue in this appeal.

XI

Indoor access to a basement is a reasonable accessory to that development.

XII

The consequence of moving the corner of the Barer home 10 feet waterward would be to move the set back line formed by connecting that corner with the home north of the northern neighbor, Mrs. Nanks. This would allow Mrs. Nanks' home to be theoretically located 2 1/2 feet closer to the water than it could theoretically be located now. The Nanks' set back line is now 115 feet from the water while the Nanks' home is in fact 135 feet from the water. There would be no shift in the set back line south of the Barer home and no significant shift in the set back line at any location, as a result of the revised proposal.

XIII

There would be no significant impairment of view by the revised basement proposal.

XIV

In rendering its denial of the original Barer basement variance, the City found that:

> *The existing large, two-story house and accessory structures on the site appear to be comparable to the development of other properties in the vicinity.*

The Barer home has 4,067 square feet of living space while the average of the five homes north and five homes south is 4,825 square feet. Moreover, the Barer home lacks a basement while the ten other homes just described have basements.

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

Variances from the Seattle shoreline master program are governed by the general shoreline variance criteria developed by the State Department of Ecology at WAC 173-14-150. As this case involves no over the water development, the governing standard is WAC 173-14-150(2).

II

The variance applicant must meet all of the following requirements under WAC 173-14-150(2):

> *(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by the master program;*
>
> *(b) That the hardship described in WAC 1783-14-150(2)(a) above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;*
>
> *(c) That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;*

(d) That the requested variance does not constitute a grant of special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief; and

(e) That the public interest will suffer no substantial detrimental effect.

III

In addition the variance applicant must show compliance with WAC 173-14-150(4) which provides:

(4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

IV

We now take up the elements of WAC 173-14-150(2), in turn:

a) Preclusion or significant interference with a reasonable use of the property.

The City urges in briefing that:

". . . an owner who wants additional amenities, space or a specific configuration does not meet this criteria if a reasonable use remains without the variance." (City's Brief, p. 9, lines 1-3).

We agree with the City that a variance does not merely turn upon what an owner wants. The folly of that approach is evident, especially considering the differing personal preferences of successive owners. We disagree with the City that what constitutes "a reasonable use" must be measured solely with regard to the reasonableness of the existing use without variance. The term "a reasonable use" is not limited by the rule to what is existing but contemplates, as well,

what is proposed. Schall and Mason County v. Department of Ecology, SHB No. 78-26 (1978) at p.7, Williams and Chelan County v. Department of Ecology, SHB No. 78-33 (1979) at p. 7.[1] Thus, in this case, the issue is not whether the Barer home as it now exists constitutes a reasonable use, but whether the home and proposed basement comprise a reasonable use. The limitation upon what is reasonable must be found by reference to what is allowed in the neighborhood where the site is located. Schall, supra, at p. 7 and Williams, supra, at p. 4. Seattle has twice taken this approach, first in 1982, when it allowed expansion "commensurate with the neighborhood," and in 1991 when it sought to allow development "comparable to the development of other properties in the vicinity." The appellant's revised basement proposal is commensurate with the neighborhood, is comparable to other properties in the neighborhood, and is a reasonable use. The strict application of the dimensional standards, set forth in the master program significantly interferes with the revised basement proposal which is a reasonable use of the property not otherwise prohibited by the master program. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(2)(a).

V

The City's focus upon the reasonableness of the existing use to the exclusion of the proposed use is reminiscent of the standard for varying permissible uses of land rather than, as here, the dimensions of a permissible, residential use. Indeed Green, infra, footnote 1 and Wilson v. Mason County, SHB No. 85-8 (1986) cited by the City in briefing were decided under the "use variance" standard formerly made applicable to "dimensional variances" by the

[1] The case of 4101 Beach Drive Homeowner's Association v. City of Seattle and Department of Ecology, SHB No. 84-49 (1985) and obiter dictum from Green v City of Bremerton and Department of Ecology, SHB No. 81-37 (1982) cited by the City in briefing (City's Brief pp 9-11) likewise took into account the proposed development in determining hardship Those cases are distinct from this one, however, in that the development proposed could feasibly have been built without exceeding the prescribed set back. The Barer's proposed basement could not feasibly be built without exceeding the prescribed set back formed by the common line of adjacent residences.

precursor of today's' WAC 173-14-150, or by the choice of a county to retain that standard in its master program. The current WAC 173-14-150 adopted by the City speaks directly to dimensional variances and the cited cases, decided under use variance criteria, are thereby distinguishable as decided by a different standard.

VI

b) That the hardship is related to the property. In this case, the hardship of adding any development to the Barer lot is the result of the very landward set back line of the master program. This authorizes development without variance only within a narrow area at the upland end of the lot where steep slopes and ground conditions make building impractical at best. This is not the result of the applicant's own actions. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(2)(b).

VII

c) Compatibility. The design of the revised project is compatible with other permitted activities in the area, and will not cause adverse effects to adjacent properties or the shoreline environment. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(2)(c).

VIII

d) Not a grant of special privilege and minimum necessary. The revised proposal accords to this lot the same amenity, a basement, common to the neighborhood and is not a grant of special privilege. The proposal, which includes the indoor access which is a reasonable accessory to a basement, is the minimum necessary to afford relief. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(2)(d).

IX

Public Interest. The public interest will suffer no substantial detrimental effect. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(2)(e).

X

There is no material cumulative effect likely to result from granting a variance for the revised proposal. The appellant has shown that the revised proposal is consistent with WAC 173-14-150(4).

XI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this:

ORDER

The denial of variance is reversed. This matter is remanded for issuance of a variance for the revised proposal as shown upon Exhibit A-2 of this record.

DONE at Lacey, WA, this 13th day of May, 1992.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

DAVE WOLFENBARGER, Member

O'DEAN WILLIAMSON, Member

WILLIAM A. HARRISON
Administrative Appeals Judge

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